

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of:	)	
	)	
Eligible Services List for Schools and Libraries	)	CC Docket No. 02-6
Universal Service Support Mechanism	)	

**REPLY COMMENTS OF VERIZON<sup>1</sup>**

The Commission may not add dark fiber to the eligible services list for schools and libraries because it is not a “telecommunications service.” Even if the Commission had the authority to include dark fiber on the list, it should not do so because fund demand already outstrips supply, and adding dark fiber would encourage waste, fraud, and abuse. And in any event, requests to add dark fiber to the eligible services list are not properly raised in this limited proceeding.

**Background**

The 2005 list of eligible services states that dark fiber is “not eligible for funding” because “[t]he FCC has not resolved whether unlit dark fiber is a telecommunications service.”<sup>2</sup> Fibertech Networks nonetheless urges the Commission identify dark fiber as an eligible service, claiming that the Commission “need not determine the regulatory classification before doing so.”<sup>3</sup> Rather, Fibertech argues that “[a] new ‘Dark Fiber’ services category could be created,”

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<sup>1</sup> The Verizon Telephone Companies (“Verizon”) are listed on Attachment A.

<sup>2</sup> Eligible Services List, Schools and Libraries Support Mechanism for Fund Year 2005, at 56. Dark fiber had been listed as an eligible service until the 2004 list was released. In removing dark fiber from the list, the Commission likewise explained that dark fiber had not been determined to be a telecommunications service.

<sup>3</sup> Fibertech Comments at 3. Another commenter, Erie 1 BOCES, urges the Commission to define dark fiber as an eligible service. Erie 1 BOCES does not explain how the Commission has authority to do so; it merely says that dark fiber “should be part of telecommunications section, receiving priority 1 status ....” Letter from Mat Dziuba, Manager, Wide Area Network, Erie 1 BOCES, dated Aug. 23, 2004, at 3. As discussed in the text, dark fiber is not a telecommunication service and thus is not eligible for funding under the FCC’s current rules.

using the Commission’s authority under Section 254(c)(3) of the Act to designate “additional services” that are eligible for support from the e-rate program.<sup>4</sup> This request cannot and should not be granted.

### **Dark Fiber Is Not a Telecommunications Service**

Dark fiber is not a “telecommunications service” as defined by the Act. Congress provided that “telecommunications service” means “the offering of telecommunications for a fee directly to the public.” 47 U.S.C. § 153(46). In turn, “telecommunications” means “the *transmission*, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” *Id.* § 153(43). Dark fiber, by its very nature, does not provide transmission of information. It is “fiber ... that has not yet been activated through optronics to render it capable of carrying communications services.” 47 C.F.R. § 51.319(a)(6). Consequently, it cannot be considered “telecommunications” and cannot be classified as a “telecommunications service.”

The Commission’s precedent likewise makes clear that dark fiber is not a telecommunications service. In the *UNE Remand Order*, for example, the Commission explained that dark fiber “*does not* have electronics on either end of the dark fiber segment to energize it to *transmit a telecommunications service*” and that dark fiber is incapable of “carrying telecommunications services.”<sup>5</sup> Thus, while the Commission held that dark fiber meets the Act’s definition of “network element” because it is a “feature, function, and capability”

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<sup>4</sup> *Id.* at 4-7.

<sup>5</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3843 (2000) (*UNE Remand Order*)(emphasis added, footnotes omitted); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17164 (2003) (*Triennial Review Order*) (same).

of loop and interoffice transmission facilities,<sup>6</sup> the Commission left little doubt that dark fiber is not itself a telecommunications service.<sup>7</sup>

### **The Commission Cannot Designate Dark Fiber as an “Additional Service”**

Fibertech is wrong in asserting that the Commission could use its authority under Section 254(c)(3) to extend support to dark fiber.<sup>8</sup> That provision empowers the Commission to “designate additional *services*” for support from the schools and libraries fund “for the purposes of subsection (h).” 47 U.S.C. § 254(c)(3) (emphasis added). Subsection (h) directs “[a]ll telecommunications carriers,” upon request, to provide to schools and libraries “any of its *services* that are within the definition of universal service under subsection (c)(3),” *id.* § 254(h)(1)(B), and further instructs the Commission to enhance “access to advanced telecommunications and information *services* ....” *Id.* § 254(h)(2)(A) (emphasis added).

Under Section 254, therefore, any “additional service” must be just that – a *service*. Dark fiber is not a service. As discussed above, dark fiber is a facility, which cannot be used to transmit communications – that is, to provide a service – unless and until electronics are attached to light it. Moreover, using a customer’s own equipment to light dark fiber does not convert it into a service for e-rate purposes, because a service can be provided only by an eligible service

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<sup>6</sup> *UNE Remand Order*, 15 FCC Rcd at 3776, 3844.

<sup>7</sup> In a 1993 decision, the Commission held that BOC individual case basis (ICB) offerings of dark fiber were “wire communications.” *Applications for Authority Pursuant to Section 214 of the Communications Act to Cease Providing Dark Fiber Service*, 8 FCC Rcd 2589 (1993), *vacated on other grounds*, *Southwestern Bell v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994). That decision, contrary to claims previously made by Fibertech and others (but not renewed here) does not compel a determination that dark fiber is a telecommunications service. As the Commission has acknowledged, “[t]he Act’s definition of ‘wire communication’ is ‘far reaching’ and clearly encompasses ... *all instrumentalities, facilities, apparatus, and services incidental to*” the transmission of information. 8 FCC Rcd at 2593 (emphasis added). In contrast, the definition of “telecommunications service” is limited to the actual transmission of information and does not include facilities. *Compare* 47 U.S.C. § 153(46) *with id.* § 153(52).

<sup>8</sup> The Commission could not designate dark fiber as an “additional services” in this proceeding in any event, even if it had authority to make such a declaration in the appropriate procedural context. As explained below, the Public Notice expressly stated that this proceeding will not be used “for changing any eligibility rules.”

provider – not by the end user. *See* 47 C.F.R. §§ 54.502 (“services provided by telecommunications carriers”), 54.503 (same), 54.517(a) (“Non-telecommunications carriers shall be eligible for universal service support under this subpart for providing the supported services described in paragraph (b) of this section for eligible schools ....”).

### **Classifying Dark Fiber as an Eligible Service Would Disserve the Public Interest**

Because dark fiber is not a telecommunications service, the Commission has no authority to identify it as an eligible service in this proceeding. Accordingly, the various policy arguments raised by Fibertech and Erie 1 BOCES, even if valid, are irrelevant.

Regardless of the merits of those arguments, any expansion of the schools and libraries fund, which is already significantly oversubscribed, would be antithetical to the public interest because it could deprive needy schools of support for other services.<sup>9</sup> Procuring and lighting dark fiber is capital-intensive and would place a significant additional drain on the fund, both for the fiber itself and for the additional equipment needed to light the fiber, assuming that equipment were eligible for support.<sup>10</sup> As the Commission has recognized, “authorizing unrestricted up-front payments ... when there is significant infrastructure build-out ... could create a critical drain upon the universal service fund, and ... could result in fewer overall schools receiving universal service funding, which ... is contrary to the goals of section 254.”<sup>11</sup>

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<sup>9</sup> The Commission has noted that demand on the schools and libraries fund exceeds the cap and is likely to continue doing so, and it is considering means of adjusting the discount matrix “in order to expand the reach of funding to lower discount bands.” *See Further Notice* at ¶¶ 9, 15, 61.

<sup>10</sup> *See* Qwest Comments, CC Docket No. 02-06, filed March 11, 2004, at 5-7 (explaining why equipment to light dark fiber would not be eligible for Priority One funding, but instead might be considered internal connections).

<sup>11</sup> *Request for Review of the Decision of the Universal Service Administrator by Brooklyn Public Library*, 15 FCC Rcd 18598, 18606 (2000).

Moreover, adding dark fiber to the list would aggravate the risk of waste, fraud, and abuse. Although schools might use dark fiber (after lighting it with their own equipment) for accessing advanced telecommunications or information services, they might also use it for ineligible purposes for which no funding is permitted. By its nature, dark fiber is a generic product that cannot be attributed to a particular use. It is not until electronics are attached and the fiber is actually lit that one can tell whether the fiber is being used for an eligible purpose. Monitoring the use would be administratively burdensome and would place an additional strain on scarce enforcement resources.

**Fibertech's request is procedurally improper.**

Finally, Fibertech's request is not properly made in this proceeding. The Public Notice soliciting comment on the eligible services list states that "this proceeding is limited to determining what specific services are eligible under the Commission's current rules; it is not intended to be a vehicle for changing any eligibility rules."<sup>12</sup> The current rules limit eligibility to four categories of services: telecommunications services, Internet access, voice mail, and internal connections. *See* 47 C.F.R. §§ 54.502, 54.503. Notably, Fibertech does not contend that dark fiber fits into any of these categories. Rather, it asks the Commission to create a new Dark Fiber category, effectively conceding that a change in the Commission's rules would be necessary to render dark fiber eligible for funding. Accordingly, the relief it seeks cannot be granted.

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<sup>12</sup> Public Notice, "Pleading Cycle Established for Eligible Services List for Universal Service Mechanism for Schools and Libraries," FCC 04-200 (rel. Aug. 13, 2004). The Commission already has inquired in a rulemaking proceeding whether dark fiber should be considered an eligible service, and this issue must properly be resolved in that proceeding. *See Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-06, FCC 03-23 (Dec. 23, 2003) ("*Further Notice*"), at ¶77.

### **Conclusion**

For these reasons, the Commission may not and should not add dark fiber to the list of eligible services.

Respectfully submitted,

By: /s/ Jeffrey S. Linder

Michael E. Glover  
Edward Shakin  
Ann H. Rakestraw  
VERIZON  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201-2909  
(703) 351-3174

Jeffrey S. Linder  
Bradley K. Gillen  
WILEY REIN & FIELDING LLP  
1776 K Street, N.W.  
Washington, D.C. 20006  
(202) 719-7000

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Attorneys for the  
Verizon telephone companies

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications, Inc. These are:

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The Micronesian Telecommunications Corporation  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
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